

5/26/04-02676



COMMONWEALTH OF PUERTO RICO
OFFICE OF THE GOVERNOR
ENVIRONMENTAL QUALITY BOARD

May 26, 2004

Ms. Jane Kenny
Regional Administrator
Environmental Protection Agency
Region 2
290 Broadway
New York, NY 10007-1866

Re: Clarification Regarding the
AFWTA NPL Designation

Dear Ms. Kenny:

Following the Hon. Sila M. Calderón's June 13, 2003 letter to former U.S. Environmental Protection Agency (U.S. EPA) Administrator, Gov. Christine Todd Whitman, and my October 21, 2003 letter to you, we met with representatives of the U.S. EPA Headquarters, U.S. Department of Defense (U.S. DoD), U.S. Navy, U.S. Army and U.S. Office of Management and Budget to discuss the designation of the Atlantic Fleet Weapons Training Area (AFWTA) to the National Priorities List (NPL). While no objections have been raised as to the specified land areas on the AFWTA to be included on the NPL, questions have been raised as to the significance of the maps that have been submitted in connection with the NPL designation.

Enclosed is a clarification of AFWTA's designation for inclusion in the NPL intended to avoid any further unnecessary delays and controversies. This clarification of the designation is in accordance with the U.S. EPA's long-standing policies regarding the NPL listing process, which is more fully set forth in the enclosed attachment "A". The Commonwealth is only designating for inclusion in the AFWTA those waters and keys in and around the municipalities of Vieques and Culebra where contamination has come to be located, or from which that contamination came, as a result of the activities of the U.S. DoD, U.S. Navy, U.S.



Army and other foreign powers at the AFWTA. The perimeter markings on the Commonwealth's maps merely identify those water areas in and around the municipalities of Vieques and Culebra where the limited available information indicates the Navy conducted operations. The perimeter markings do NOT purport to designate or otherwise identify the boundaries of the AFWTA. The U.S. EPA, the Commonwealth, and the U.S. Navy will ultimately have to determine which water areas require investigation and clean up pursuant to a well-established and well-understood process for conducting a CERCLA clean up. This process is also in accordance with U.S. EPA's longstanding principle that the clean up follows the contamination. The Commonwealth's designation of the AFWTA was not intended to determine what areas must be addressed, but rather to initiate a credible, systematic, and technically supportable process for investigating and, where necessary, cleaning up those areas where contamination has come to be located, or from which that contamination came.

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We have attached the Navy's Draft Summary of Agreed Areas for Vieques Portion of AFWTA – NPL Site Boundaries, which outlines the "agreed areas". See Attachment B. The Commonwealth believes that it is in agreement with the U.S. Navy that -once the AFWTA is designated on the NPL, the Preliminary Assessment/Site Investigation (PA/SI) process will initially focus on the areas in and around Vieques where the U.S. Navy is aware of possible contamination. These areas were best described by the U.S. Navy in Attachment B, based on present information. The PA/SI process will also determine if additional areas in the AFWTA require a response action. For example, the U.S. EPA will consider the U.S. Navy's available records as well as other relevant sources of information, including local reports. Subsequently, the Remedial Investigation/Feasibility Study (RI/FS) process will determine if any remedial action is required in accordance with the National Contingency Plan. The Commonwealth agrees with the U.S. Navy that any portion of water deeper than 150 feet would only be investigated if there is a cost effective technology and a health risk or contamination migration to shallow waters.

It is my hope that this clarification of the NPL designation made in accordance with the U.S. EPA's longstanding policies and practices for listing NPL sites on the NPL will facilitate prompt sign-off by the Bush Administration on our Governor's designation of the areas formerly used by the U.S. DoD or U.S. Navy for study and clean-up under the U.S. EPA and P.R. Environmental Quality Board supervision. We suggest that the description of the designation in the Federal Register should be "the specified land areas as well as the waters and keys in and around the municipalities of Vieques and Culebra where contamination has come to be located as a result of the activities of the U.S. DoD, the U.S. Navy, or of



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foreign powers." The standard language included in the U.S. EPA's preamble discussions for NPL listings should be included to ensure that the interested parties have notice that the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which that contamination has come to be located, or from which that contamination came. EPA's policy avoids requiring it to amend the NPL as further research reveals more information about the location of the contamination or release. The AFWTA listing should generally describe the area as the lands of and the waters and keys in and around the municipalities of Vieques and Culebra and not in terms of "boundaries" on either our map or the Navy's.

Thank you for your prompt consideration of this matter.

Sincerely,

Esteban Mujica Cotto
President

CC: Hon. Sila M. Calderón
Governor
Commonwealth of Puerto Rico

Hon. César Miranda
Puerto Rico Chief of Staff

Hon. Anabelle Rodríguez
Secretary of Justice
Puerto Rico Department of Justice

Hon. Aníbal Acevedo-Vilá
PR Resident Commissioner

Mr. Michael O. Leavitt
Administrator
U.S. EPA

Ms. Carol Dennis
Attorney
Office of Natural Resources, Energy, and Science
Office of Management and Budget



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Mr. Paul Yaroschak
Director, Environmental Compliance & Restoration Policy
Office of the Assistant Secretary of the Navy (Installations & Environment)

Mr. Ray Fatz
Deputy Assistant Secretary of the Army (Environment, Safety and Occupational Health)

Mr. George Pavlou
Director, Emergency of Remedial Response Division
U.S. EPA, Region 2

Mr. E. Donald Elliott
Outside Counsel to the Commonwealth of Puerto Rico
Willkie Farr & Gallagher LLP

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ATTACHMENT "A":

**CLARIFICATION REGARDING THE ATLANTIC FLEET WEAPONS
TRAINING AREA (AFWTA) DESIGNATION FOR INCLUSION IN THE
NATIONAL PRIORITIES LIST**

The Commonwealth is only designating for inclusion in the Atlantic Fleet Weapons Training Area (AFWTA) on National Priorities List (NPL) the specified land areas and those waters and keys in and around the municipalities of Vieques and Culebra where contamination has come to be located, or from which that contamination came, as a result of the activities of the Department of Defense (DoD), the U.S. Navy (Navy) and other foreign powers at the AFWTA. As described in Hon. Sila M. Calderón's designation letter of June 13, 2003, over the course of a century, the DoD and the Navy have used the eastern and western portions of the island of Vieques and the Culebra Island Archipelago and their surrounding keys and waters for military training exercises. In that letter, the Governor designated the AFWTA as the highest priority facility in the Commonwealth of Puerto Rico and requested that it be placed on the National Priorities List (NPL). The designation was made in accordance with Section 105(a)(8)(B) of CERCLA. 42 U.S.C. § 9605(a)(8)(B).

Esteban Mujica-Cotto, President of the Puerto Rico Environmental Quality Board (PREQB) also explained in his October 21, 2003 letter to Jane Kenny, U.S. Environmental Protection Agency (U.S. EPA) Regional Administrator for Region 2, the basis for including specific description of the lands and waters included in the AFWTA and excluding the current active Vieques and Culebra municipal landfills and the portions of Flamenco Beach and campground and mooring locations at Culebra that were investigated for ordnance contamination and were subject to ordnance removal actions by the U.S. Army Corps of Engineers since 1995. The maps attached to this October letter were merely intended to identify the general area and do not represent "boundaries" of the NPL site or of the water areas to be studied or remediated. Attachment B describes the areas, in and around Vieques, where the Navy is aware of possible contamination, as a result of the activities of the DoD, the Navy or of foreign powers. As with all NPL sites, the precise nature and extent of the site are typically not known at the time of the listing. See, e.g., 69 Fed. Reg. 10,646, 10,648 (Mar. 8, 2004).

The AFWTA listing is in accordance with standard practice. When listing a site, EPA describes the relevant releases "to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the 'boundaries' of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which that contamination has come to be located, or from which that contamination came." *Id.* That well-recognized principle applies here, where some areas within the areas shown on the maps may not deserve further scrutiny, but it may also turn out that contamination has come to be located outside them.

The NPL primarily serves as an information and management tool. It is a part of the Superfund cleanup process. The identification of a site for the NPL is intended primarily to guide EPA in:

- determining which sites warrant further investigation to assess the nature and extent of the human health and environmental risks associated with a site;
- identifying what CERCLA-financed remedial actions may be appropriate;
- notifying the public of sites EPA believes warrant further investigation; and
- serving notice to potentially responsible parties that EPA may initiate CERCLA-financed remedial action.

Inclusion of a site on the NPL does not in itself reflect a judgment of the activities of its owner or operator, it does not require those persons to undertake any action, nor does it assign liability to any person. The NPL serves primarily informational purposes, identifying for the States and the public those sites or other releases that appear to warrant remedial actions. After a site is listed on the NPL, a Preliminary Assessment/Site Inspection (PA/SI) is performed at the site. The PA examines historical records and may include interviews to help determine the extent of release. The SI includes actual field observations. Based on the findings in the PA/SI, a Remedial Investigation/Feasibility Study (RI/FS) may be required. The remedial investigation serves as the mechanism for collecting data to:

- characterize site conditions;
- determine the nature of the waste;
- assess risk to human health and the environment; and
- conduct treatability testing to evaluate the potential performance and cost of the treatment technologies that are being considered.

The FS is the mechanism for the development, screening, and detailed evaluation of alternative remedial actions.

The RI and FS are conducted concurrently —data collected in the RI influence the development of remedial alternatives in the FS, which in turn affect the data needs and scope of treatability studies and additional field investigations. This phased approach encourages the continual scoping of the site characterization effort, which minimizes the collection of unnecessary data and maximizes data quality. The RI/FS process includes these phases: scoping, site characterization, development and screening of alternatives, treatability investigations, and Record of Decision (ROD).

Another important stages of the CERCLA process are the Record of Decisions (ROD), Remedial Design (RD) and Remedial Action (RA). The ROD is a public document that explains which cleanup alternatives will be used to clean up a Superfund site and, for sites listed on the NPL, it is created from information generated during the RI/FS.

Remedial Design (RD) is the phase in Superfund site cleanup where the technical specifications for cleanup remedies and technologies are designed. Remedial Action (RA) follows the remedial design phase and involves the actual construction or implementation phase of Superfund site cleanup. The RD/RA is based on the specifications described in the ROD.

Once the AFWTA is designated on the NPL, the RI/FS process will initially focus on the areas where the Navy is aware of contamination. In accordance to EPA's practice, the RI/FS process will also study the AFWTA to identify further areas for remediation. EPA has explained that the "NCP [National Contingency Plan] does provide that the nature and extent of the threat presented by a release will be determined by an RI/FS as more information is developed on site contamination." 56 Fed. Reg. 5598 (Feb. 11, 1991) *citing* 40 CFR 300.430(d)(2). EPA also states that:

during the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, this inquiry focuses on an evaluation of the threat posed; the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination 'has come to be located' before all necessary studies and remedial work are completed at a site. Indeed, the boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.

69 Fed. Reg. at 10,648.

Therefore, as a part of this investigation, EPA will consider the U.S. Navy's available records as well as other relevant sources of information, including local reports. Through this RI/FS process the area in which clean up is necessary will be further refined.

The Commonwealth suggests that the description of the designation in the Federal Register should be "the specified land areas¹ as well as the waters and keys in and around the Islands of Vieques and Culebra where contamination has come to be located as a result of the activities of the DoD, the Navy or of foreign powers." The standard language included in EPA's preamble discussions for NPL listings² should be included to ensure that the interested

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¹ Those land areas of Vieques and Culebra specified in the October 21, 2004 letter from PR EQB's President to .S EPA Region 2 Administrator.

² The standard language in the preamble includes the following test: "The NPL does not describe releases in precise geographical terms; it would be neither feasible nor consistent with the limited purpose of the NPL (to identify releases that are priorities for further evaluation), for it to do so. Although a CERCLA "facility" is broadly defined to include any area where a hazardous substance release has "come to be located" (CERCLA section 101(9)), the listing process itself is not intended to define or reflect the boundaries of such facilities or releases.... When a site is listed, the approach generally used to describe the relevant release(s) is to delineate a geographical area (usually the area within an installation or plant boundaries) and identify the site by reference to that area. As a legal matter, the site is not coextensive with that area, and the boundaries of the installation or plant are not the "boundaries" of the site. Rather, the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which that contamination has come to be located, or from which that contamination came. In other words, while geographic terms are often used to designate the site (e.g., the "Jones Co. plant site") in terms of the property owned by a particular party, the site properly understood is not limited to that property (e.g., it may extend beyond the property due to contaminant migration), and conversely may not occupy the full extent of the property (e.g., where there are uncontaminated parts of the identified property, they may not be, strictly speaking, part of the "site"). The "site" is thus neither equal to nor confined by the boundaries of any specific property that may give the site its name, and the name itself should not be read to imply that this site is coextensive with the entire area within

parties have notice that the site consists of all contaminated areas within the area used to identify the site, as well as any other location to which that contamination has come to be located, or from which that contamination came. EPA's policy avoids requiring EPA to amend the NPL "as further research reveals more information about the location of the contamination or release." 69 Fed. Reg. at 10,648.

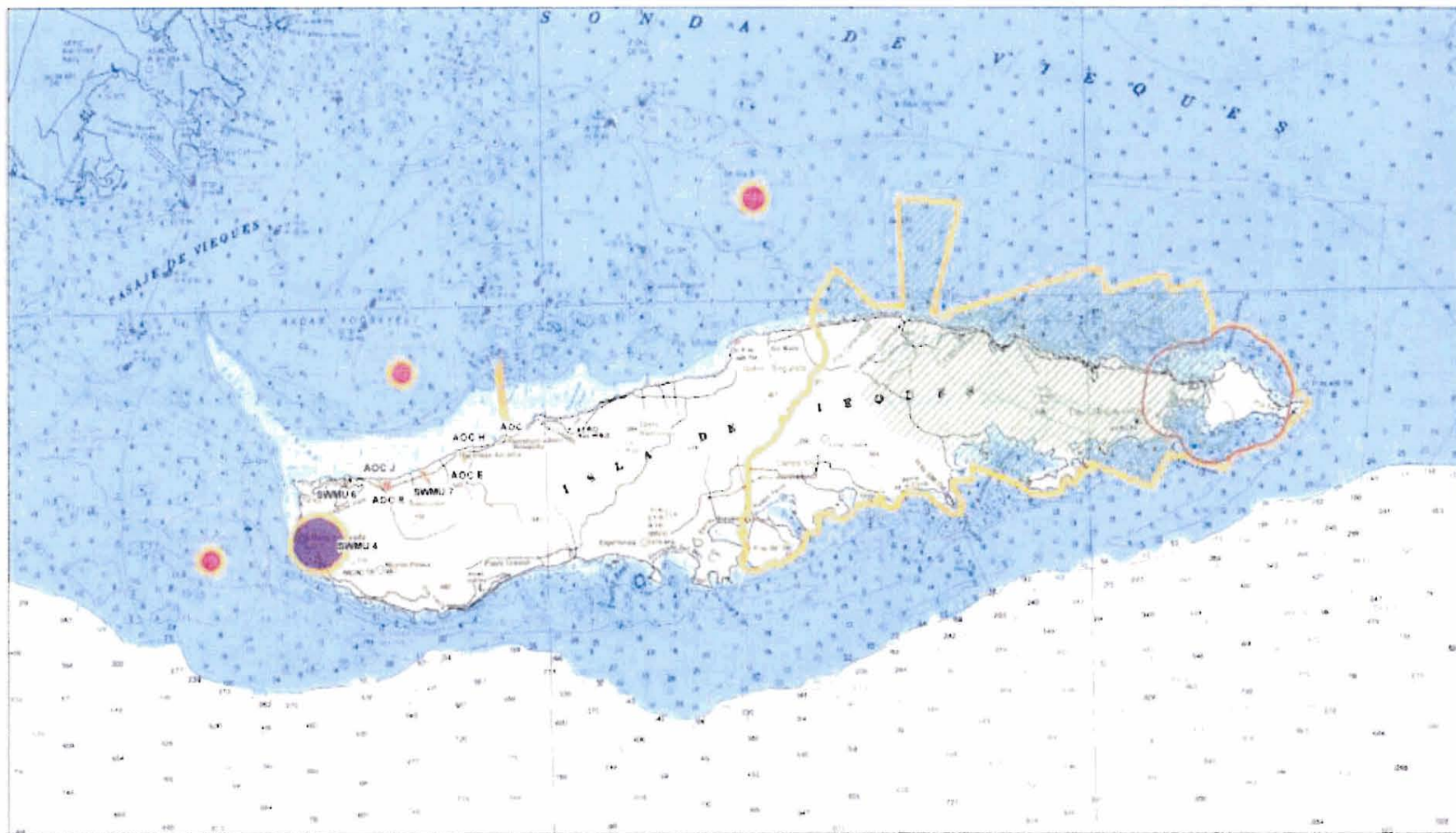
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the property boundary of the installation or plant. The precise nature and extent of the site are typically not known at the time of listing. Also, the site name is merely used to help identify the geographic location of the contamination. For example, the name "Jones Co. plant site," does not imply that the Jones company is responsible for the contamination located on the plant site. EPA regulations provide that the "nature and extent of the problem presented by the release" will be determined by a remedial investigation/feasibility study (RI/FS) as more information is developed on site contamination (40 CFR 300.5). During the RI/FS process, the release may be found to be larger or smaller than was originally thought, as more is learned about the source(s) and the migration of the contamination. However, this inquiry focuses on an evaluation of the threat posed; the boundaries of the release need not be exactly defined. Moreover, it generally is impossible to discover the full extent of where the contamination "has come to be located" before all necessary studies and remedial work are completed at a site. Indeed, the known boundaries of the contamination can be expected to change over time. Thus, in most cases, it may be impossible to describe the boundaries of a release with absolute certainty.... For these reasons, the NPL need not be amended as further research reveals more information about the location of the contamination or release. 69 Fed. Reg. at 10,648.

ATTACHMENT "B":

FIGURES THROUGH 3 PREPARED BY THE U.S. NAVY

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Legend

- | | | |
|---|---|-----------------------|
| Explosive Safety Quantity Distance | Artillery Safety Fan | Water Depth |
| Agreed Areas of Proposed NPL Site | Western Vieques Environmental Sites | 0-10 Feet |
| Commonwealth Proposed Approximate Site Boundary | SWMU 4 (Former OB/OD Site) | 10 - 150 Feet |
| Anchorage Location Boundary | Greater Than 0.5 Naval Gunfire Rounds/Acre/Year | Greater Than 150 Feet |

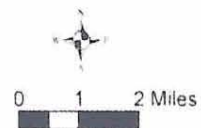


Figure 1
NPL Agreed Areas
Vieques, Puerto Rico

TRA: STAGNATION OF THE WINDMILL TOWNSHIP CLEAN ENERGY, 2022-23, FROM THE SUBSIDY & POTENTIAL NEG. IMPACTS FROM THE SWEDEN (CWS)

